
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, Ohio 45202

88-ERA-21

In the Matter of

KEVIN A. GARN
Complainant

v.

TOLEDO EDISON COMPANY
Respondent

Terry J. Lodge, Esq.
For the complainant

Patrick Hickey, Esq.
For the employer

Charles W. Campbell
Administrative Law Judge

RECOMMENDED DECISION

This is a proceeding under the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5801, *et seq*., and its implementing regulations, 29 CFR part 24. The specific provision of the ERA involved in this case is 42 U.S.C. § 5851, which states in pertinent part as follows:

> § 5851. Employee Protection (a) Discrimination against employee. No employer, including a Commission licensee, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employer (or person acting pursuant to a request of the employee)---

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement, imposed under this Act or the Atomic Energy Act of 1954, as amended;
(2) testified or is about to testify in any such proceeding or, (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

Kevin Garn, the complainant, was employed by Benchmark Technologies. Pursuant to contract, Benchmark supplied temporary employees, including the complainant, to Toledo Edison Company, the respondent, a licensee of the Nuclear Regulatory Commissioner (NRC). The complainant was discharged by the respondent on May 16, 1987.

Upon motion by the respondent that the claim had been untimely filed, I issued a recommended order dismissing the complaint on October 18, 1988. On September 25, 1990, the Secretary of Labor issued a decision and order of remand in this case, remanding the case to me to consider the claimant's blacklisting claim but upholding my decision that the claimant had not timely filed a complaint regarding his discharge.

Following proper notice, a hearing was held before me in Bowling Green, Ohio, on July 17 and 18, 1991, at which the parties were afforded the opportunity to present evidence and argument. At the hearing, I granted a motion by the complainant that Benchmark Technologies be dismissed as a party to the case (Tr. at 6). The remaining parties both submitted post-hearing proposed findings of fact and conclusions of law. The respondent also submitted a post- hearing brief and a motion to supplement the record, and the complainant submitted a reply brief. The respondent's motion to supplement the record with an affidavit of Paul M. Byron is hereby granted and the affidavit is admitted into evidence as Toledo Edison's Exhibit 66.

ISSUES

The issues in this case are whether the complainant engaged in protected activity, whether he was "blacklisted" by his employer, and whether any blacklisting that may have occurred was motivated by his alleged protected activity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the entire record of this cast and the applicable law. Where appropriate, consideration has been given to my observation of the appearance and demeanor of the witnesses. Each exhibit in the record has been carefully considered, whether or not it is mentioned in this recommended order.[1]

A. Burden of proof. *Dartey v. Zack Co. of Chicago*, 82-ERA-2 (April 25, 1983) (copy attached) sets out the allocation of the burden of proof in cases

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arising under the Energy Reorganization Act. According to *Dartey*, the employee first bears the burden of establishing a prima facie case by showing that he engaged in protected conduct, his employer was aware of that conduct, his employer took adverse action against him, and his protected activity was the likely reason for the adverse action. Once the employee establishes a *prima facie* case, the burden of production shifts to the employer to rebut the presumption of disparate treatment by presenting evidence of a legitimate, non-discriminatory reason for the adverse action. If the employer's evidence rebuts the complainant's *prima facie* case, the employee has the opportunity to demonstrate that the employer's proffered reason for the adverse action was mere pretext or that the employer was more likely motivated by a discriminatory reason. Then, the trier of fact may (a) reject the employee's evidence and conclude that the employer was not motivated in whole or in part by discriminatory reasons, (b) find that the employee established that the employer's proffered justification was mere pretext, or (c) find that the employer had a "mixed motive" in taking adverse action against the employee. If the trier of fact finds that the employer had a mixed motive, the employer then bears the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the employee's protected conduct. *Dartey*, slip op. at 7-9. *See also Emory v. North Bros. Co*., 86-ERA-37 (May 14, 1987).

B. The prima facie case. To establish his *prima facie* case, the complainant must show that he engaged in protected activity, that his employer was aware of that protected activity, and that the employer took adverse action against him based on that protected activity. The complainant alleges that he engaged in several activities that constitute protected activity.

1. Background. Pursuant to its contract with Toledo Edison, Benchmark hired the complainant to work at Toledo Edison's Davis-Besse Nuclear Power Plant as a data entry clerk, and he began work on April 14, 1987, in the Systems & Procedures (S&P) section. The complainant's primary job was to input data to update what was called the Test and Procedure Index (Tr. at 21, 230- 31). Davis-Besse's day-to-day operations were accomplished via certain procedures, which were and updated on a computer system. There were even procedures for creating, numbering, and changing procedures (See T 7 at 2). The complainant was responsible for putting all additions, changes, and revisions made to procedures into the Test and Procedure Index (Tr. at 26, 230-31).

On May 5, 1987, the complainant and other data entry clerks in his section attended a meeting regarding a new numbering system, the responsibility for which had just been transferred to their section. At that meeting, the

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complainant's supervisor, Diane Levering, stated that if the employees neglected to update the system properly, the section that had previously been responsible for the system might take responsibility again (T 21 at 2). The complainant and the other employees present at the meeting interpreted this statement as an order to neglect the system purposely, and they protested. The complainant stated that he wanted to speak with Mr. Sidney Goldstein, Levering's supervisor, about the matter, but Levering told him that Goldstein himself wanted it that way (T 21 at 2). The complainant then made the statement that he would go to the plant supervisor if necessary to settle the dilemma. After some discussion, the employees in the group and Levering agreed to maintain the system properly (T 21 at 2).

The claimant did not, in fact, approach Goldstein about the problem, but Goldstein approached him not long after that day and was angry. Goldstein informed the complainant that if he had a problem with Goldstein's policies, to see Goldstein about it. The complainant informed Goldstein that Levering forbade it (T 21 at 2-3). No more came of the incident at the time.

The Nuclear Regulatory Commission, which investigated several allegations made by the complainant, found that the complainant's allegations in this regard were "substantiated" (C 14 at 29). The NRC substantiated that a supervisor in S&P was overheard to say, "If S&P doesn't do a good job on issuing procedure indexes, maybe DC [document control] will take that responsibility back" (C 14 at 28). The NRC stated that the S&P supervisor (Levering) denied making the comment but attributed it to the manager (Goldstein). At the hearing, Levering indicated that the remark might have been made in passing but that it was never intended as an order to employees to do less than their best work (Tr. at 323).

The complainant asserts that his conduct in resisting the perceived order to fail to update the system played a pan in Toledo Edison's decision to "blacklist" him.

On Tuesday, May 12, the complainant informed Goldstein that a database system that was supposed to contain information identical to that in another system, for which the complainant had responsibility, was not up to date in revisions and changes in the system (T 21B at 6). Goldstein then assigned the complainant the task of matching up the systems. Goldstein told him to have the systems matched by the following Monday and that the complainant should do whatever he had to in order to complete the task by that Monday. When the complainant informed Goldstein that he would need to work overtime to complete the assignment (it was in addition to his other duties as a clerk), Goldstein told him to check with Levering (T 21B at 6).

Levering testified that, on that same day, she had a conversation with Goldstein about the complainant, and that they agreed that day that the complainant was to be terminated the following Monday "because of all the problems with personnel and the tension that he was causing" (Tr. at 238-39). Levering's testimony indicated that the complainant repeatedly refused to follow orders and that he had a hostile, volatile personality (Tr. at 233-36, 249). She stated that Goldstein agreed to terminate the complainant in order to relieve Levering of the stress of doing so (Tr. at 247, 303). Because Goldstein would be gone the remainder of the week, they agreed he would inform the complainant on Monday, May 18, that his employment was terminated (Tr. at 241).

During the remainder of the week, the complainant attempted to secure permission for worlding overdose that weekend to complete his assignment, but Levering refused to giver permission (Tr. at 239, 242). While Levering testified that she gave him explicit instructions not to come in over the weekend, he stated that she never explicitly told him not to come in, although when he spoke to her Friday morning, he stated that he had to come in over the weekend to complete his project and she said "please don't" (Tr. at 31-32). The complainant stated that after she said that, he attempted to set up a meeting with her for 4:00 p.m. that day to discuss it, but she wasn't there at 4:00 as he thought they had agreed (Tr. at 32). Levering testified that other employees informed her that the complainant had stated to them that he didn't care what Levering said, she didn't know what she was doing and he was going to come in Saturday anyway (Tr. at 24243).

Either on Thursday, May 14, or Friday, May 15, Levering left a note on the complainant's desk instructing him to report to Goldstein at 10:00 a.m. the following Monday to discuss the complainant's hours (C 3). Although the note did not say so, the meeting had been arranged to discharge the complainant.

On Thursday, May 14, 1987, the complainant was supposed to enter information into the Test and Procedure Index from a cover sheet for a new procedure, AD 1805 Revision 27. AD 1805 was a procedure setting out the steps for revision of other procedures at Davis-Besse (Tr. at 26). The complainant alleges that according to the controlling procedure, Nuclear Group Procedure AV 115, and Revision 26 of AD 1805, the Quality Assurance Director (QAD) had to approve revisions or changes before they could become effective (Tr. at 27-29). Revision 27 would have changed that; the QAD's approval would no longer be required on certain procedures. However, as of the time the information on Revision 27 was to be entered in the T&PI, the complainant believed that the QAD's signature was required before the procedure should be processed (Tr. at 27-29).

The sheet from which the complainant was to take the information to input into the database did not have the QAD's signature (T 7 at 2). The complainant stated that he believed he should not put the information on Revision 27 into the computer without the QAD's signature. He claims that he asked several co-workers about whether he should process it and that they told him that while it should not be processed without the

signature, he should do it anyway and not rock the boat or make waves, because the issue was "hot" (T 21B at 3; Tr. at 28).

Nevertheless, his reservations about putting the information on Revision 27 into the computer led him to seek out Levering, who told him to process it without the signature. The complainant told her that he wouldn't process it unless she wrote on the cover sheet that he should process it without the QAD's signature (T 21B at 4; Tr. at 30-31). She wrote out the permission, and he processed it. Later, the procedure was removed from the system (C 10 at 2).

The complainant alleges that his resistance to processing AD 1805 Revision 27 and calling his supervisor's attention to the improper processing motivated his employer to blacklist him.

The employer's attempts to explain why Revision 27 was issued without the QAD's signature show that the topic was indeed "hot." The employer's first response to the complainant's allegations in this matter came on the response to the ombudsman's report in June 1987 (C 10). Mr. Shefers, the Information Management Director, stated that there was no place on the cover sheet of AD 1805 for the QAD's signature (C 10), despite the fact that the face of the document contained a space for the signature, (T 7 at 2). He stated that Revision 27 had gone through a Station Review Board (SRB) review with a QA representative on the Board, implying that this was sufficient approval. He indicated that the procedure had been processed through normal channels. He stated that Revision 27 had been pulled off the computer because there was to be a delayed approval date on the procedure to allow time for a revision to Nuclear Group Procedure AV 115 (C 10). The complainant's dissatisfaction with these answers is corroborated by the results of the later NRC investigation, in which the NRC stated that "[t]he responses made to the Ombudsman Report [on this issue] were not based on an in-depth, comprehensive independent effort, with the result that definitive answers were not provided to the alleger by the licensee" (C 14 at 33).

The testimony from the hearing shows that because the QAD would not approve the procedure, AD 1805 Revision 27 had been the focus of a meeting of the Station Review Board, which included a member of Quality Assurance. Although the QAD's concerns were still not resolved at that meeting, it was apparently determined that the procedure could be processed without the QAD's approval if the implementing procedure, AV 115, were revised prior to the revision of AD 1805. However, the Plant Manager, Lou Storz, ordered AD 1805 Revision 27 to be

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processed before AV 115 had been revised (C 14 at 56).

The results of the NRC's investigation of the matter showed that the NRC believed that Nuclear Group Procedure AV 115 had to be modified before Revision 27 could be

issued, because AV 115 required the QA's approval on Revision 27 (C 14 at 24). The NRC found that the issuance of Revision 27 without either the QA's approval or the prior modification of AV 115 was a violation of Toledo Edison's internal operating procedures and therefore of the Nuclear Quality Assurance Manual (C 14 at 26-27). It also stated that Davis- Besse management failed to resolve the significant policy issue difference between the production organization and the quality organization, a violation of NRC corrective action requirements (C 14 at 27).

Toledo Edison acknowledged the NRC violation in its "Response to Inspection Report 88004," February 28, 1988 (C 14 at 38). As an explanation, Toledo Edison stated that the SRB had approved AD 1805 Revision 27 on the condition that AV 115, the controlling procedure, be revised to allow deletion of QA's approval. It stated that Storm signed Revision 27 without knowing that AV 115 had to be revised first. To explain why, the S&P issued the procedure without the QA's signature after the plant manager signed it, Toledo Edison stated that "it was not the responsibility of the Information Management Department to determine the appropriateness of the approval process but to complete processing through distribution" (C 14 at 39).[2] In a supplemental report dated December 11, 1989, the NRC indicated that their investigation revealed that the plant manager signed and approved the procedure without ascertaining the resolution of the SRB's comments. This, the NRC stated, showed poor judgment but was insufficient to show a willful violation (C 14 at 56).

In her testimony, Levering indicated that once a procedure had been signed by the plant manager (as Revision 27 had), her department's responsibility was to process the procedure administratively and make it available to plant personnel (Tr. at 245). Revision 27 was implemented, she stated, independently of what the complainant did to input the data into the computer. What the complainant put into the computer was only for tracking, only for counting the amount of work that had been done that day (Tr. at 343). Document Control held the formal databases.

In essence, she believed that her department was controlled by the actions of the plant manager, and when he signed something, the department processed it, no matter what. Anything done after that would have to be done by way of another procedure, and nothing more could be done to change the procedure already in the system (Tr. at 350-53). This explanation is noted to be inconsistent with the fact that the procedure was subsequently "taken out of

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the system," put back in, and processed as Revision 27.

Earlier in the week, the complainant and other employees had attended a meeting with Goldstein, in which Goldstein informed the employees that, contrary to prior practice, all overtime work would have to be approved in advance (Tr. at 33). Despite the fact that he had never received permission to work overtime on Saturday, May 16, the complainant

went to work on Saturday ostensibly to "match up" the two databases as Goldstein had instructed him. When two other employees from his section showed up as well, he went to the protected area. Instead of completing his assignment of matching the systems, he began looking for procedures to input into the database (Tr. at 35-36).

The two women from the complainant's section had been instructed by Levering to call her if the complainant showed up. They did so, and Levering tried to phone the complainant, but he was not at the work stations where he would have been if he were matching the systems (Tr. at 250). Levering came in to work and brought security personnel with her to confront the complainant. She had him "escorted off site," which included doing a radiation check and taking his access badge (things not usually done unless an employee were being terminated). The complainant testified that Levering never informed him that he was being terminated (Tr. at 36). In fact, an ombudsman report dated June 25, 1987, states that the parking sticker from the complainant's car was not removed that day because "no official termination of the employee was done." (C 10) As he left, he stated that Levering was doing the devil's work, and that he walked with God but she did not (Tr. at 250). The complainant also shouted to her that her lies had better be good to hold up Monday (Tr. at 143).

That Saturday the complainant called the Davis-Besse ombudsman, Sue Zunk, and made an appointment for the following Monday. The ombudsman's office had been set up to receive and document employee complaints and see that they were, addressed by the proper personnel, but the ombudsman had little authority to solve problems independently. It was customary for terminated or resigning employees to have an "exit interview" with the ombudsman to determine whether they had any safety complaints or comments to make before they left Davis-Besse (T 60 at 2; Tr. at 398).

At this meeting, the complainant did not tell Zunk about any particular safety concerns that he had. She stated that he would say things like "What about quality? What about safety?" but that he would not tell her any specifics, even though she encouraged him to do so (Tr. at 43 1). There was a form he was supposed to sign stating (a) he had no safety concerns, (b) he had concerns and had told the ombudsman about them, or (c) he had concerns

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but did not wish to discuss them at the time. He refused to sign the form (Tr. at 405). The complainant stated that he had not fully read the document before he refused to sign it (Tr. at 39-40, 154).

The complainant stated that after he left Zunk's office, he resolved to go to Toledo Edison's main office in Toledo to discuss his concerns (Tr. at 40-41). He started out on the highway, but stated that a Toledo Edison truck pulled alongside him and refused to let him pass, slowing down when the complainant slowed, and speeding up when the complainant did. The complainant at one point alleged that this truck tried to run him off

the mad, but at the hearing he just said that it wouldn't let him pass. He also stated that he only tried to pass twice and was thwarted (Tr. at 42).

He managed somehow to get around this truck because he got off at an exit and went to a tavern, where he stayed for between 45 minutes and two hours. He had at least one beer. While he was there, he says that three Toledo Edison employees came in and sat down near him (Tr. at 43). They talked for a while; then, as they were leaving, one made the comment "you know what happens to people" who put their noses where they don't belong, and another said that the complainant should "take extra good care of his wife and kids" (Tr. at 43). The complainant stated that he took these statements as threats against him because he had not mentioned his wife and children to the employees. However, at the hearing, the claimant stated he had informed the employees about his problems at Davis-Besse concerning AD 1805 Revision 27 (Tr. at 163-64).

Although the complainant obviously believes that the incident with the truck and the conversation with the Toledo Edison employees were purposely committed with the intent to intimidate him, I cannot agree. It is surely not unusual to be blocked by a truck in highway traffic, and the complainant admitted that he only tried to get around the truck twice. Moreover, he was able to get away from the truck and exit the highway when he wanted to. The complainant admitted that he had informed the men at the bar of his troubles at work, and this would account for at least one of the statements made to him. The asserted comment about his wife and children could have been a passing comment that was not designed to intimidate him.

The complainant stated that he spoke to Carol Zimmerman, a co-worker, on Wednesday, May 20, about his termination (Tr. at 45). She informed him that it had all been a big mistake and that he should drop a resume off at the Davis- Besse guard shack (Tr. at 45). Sometime after that, he spoke with Jack Dillich of Text Support about obtaining employment. After that conversation, he met with two Davis-Besse employees (one from Instrumentation and Control) for lunch to discuss job opportunities. AD 1805 Revision 27 was not mentioned

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at this lunch (Tr. at 46-47).

According to Kathleen Rourke, an employee of Toledo Edison who worked in the Access Control department, on May 21, 1987, Levering spoke to Access Control about the complainant's termination. Levering explained the complainant's termination and Levering's past problems with his behavior (Tr. at 457). The tenor of the conversation related to the complainant's refusal to follow orders, his dislike of women, and what Levering described as a "violent potential." In her notes of the conversation, Rourke wrote that the complainant was "untrustworthy" (Tr. at 459).

The reference to the complainant's alleged "untrustworthiness" is relevant to the Denied Access List (DAL) because personnel are given access to certain areas of the plant based on whether they are trustworthy (Tr. at 459). An employee can be placed on the Denied Access List for a variety of reasons, most which pertain to security (Tr. at 361). Being on the list prevents an employee from being able to gain physical access to the plant and also acts as a screening device for potential employees (Tr. at 367, 482-83; C 19 at 10- 12). A person on the host could not come on site without an escort and apparently could not be rehired without being taken off the list (Tr. at 367, 482-83).

Rourke says she shared the information that Levering gave her with either her boss, Michelle Benedict, or the security manager, Gary Skeel (Tr. at 460). Rourke, who was privy to the Denied Access List at the time, stated that the complainant's name was not on the DAL as of May 21 (Tr. at 461).

The complainant got a letter on May 22, 1987, from Linda Perman of Benchmark Technologies, telling him that he had been let go due to a reduction in force (C 4). The testimony from Perman shows that she wrote down "reduction in force" not because that is what she was told by Toledo Edison, but because when she called to find out if the complainant would be replaced, she was told that he would not, indicating to her that the position had been eliminated (Tr. at 201). The complainant's former duties have been assumed by other Toledo Edison employees, but he was not replaced.

On May 26, 1987, Mr. Shefers sent an internal memo to Mr. Grimes, head of security. Shefers' memo indicated that he had been asked by Access Control as well as the Instrumentation and Control (I&C) section to review the complainant's denied access status because the I&C wanted to hire the complainant. Shefers indicated that he would take the complainant off the list but that he had reservations about complainant's abilities as an employee (T 13).

On May 27, 1987, Levering sent a written "Fitness for Duty" report to Michelle Benedict in Access Control regarding her evaluation of the complainant (T 14). She stated that he demonstrated a poor attitude, lack of cooperation, mood swings, and poor social interaction. She documented all the troubles she had had with him, including refusal to accept assignments from her, high error rate, refusal to allow them to train him on the systems, failure to give the proper information for reports, angry and threatening (and bizarre) statements and attitude, dislike for working with women, mood swings, accusing other employees of stealing things that belonged to the office, and ripping a phone book from the partition of another employee's work station. She stated that she had seen or at least knew about the memo that Shefers sent to Grimes on May 26, because he had asked for her input. She stated that it would be all right with her if the complainant worked for Davis-Besse, but just not in her area, S&P (T 14, Tr. at 279).

On May 28, Rourke received a call from Skeel telling her that, per Mr. Grimes, it was o.k. to "remove" the complainant's name from the Denied Access List (T 15). Rourke indicated that when she wrote down the message she put the word "remove" in quotations because to her knowledge the complainant's name had not yet actually been put on the DAL (Tr. at 462). On this day, or maybe the 27th, the complainant stated that he had lunch with Mr. Butler from Instrumentation and Control and Mr. Kaspar about a job (Tr. at 46-48). Rourke's notes show that she left a message with Butler on the 28th about the complainant being removed from the list (T 15, Tr. at 462-63). Butler did not hire the complainant.

The complainant also spoke to Goldstein in early June, and Goldstein informed him that there was no reason that Goldstein knew of to prevent the complainant from being re-employed with Davis-Besse (Tr. at 49). Although the complainant apparently believed that he had been terminated for his resistance to processing AD 1805 Revision 27, there is no indication that anyone at Davis- Besse mentioned that procedure to him while discussing his termination and potential rehiring (Tr. at 45-52).

Sometime during the summer between June and August (T 64 at 70), the complainant went to Rumpf Corp., another temporary employee contractor, and talked to Ms. Sharon Welter to try to get work (Tr. at 212). She knew of an opening at Davis-Besse for data entry in the S&P, and because the complainant indicated that he had worked there before, she was excited about being able to place him right away (Tr. at 212). When she called, she was told she could not send the complainant for that job. After she got off the phone, she asked him if something had happened to him while he was working at Davis-Besse (Tr. at 214). She mentioned that, to her knowledge, when employees are escorted off

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site, they are put on a denied access list (Tr. at 215-16). The complainant stated that she told him he had been blackballed. She testified that she could not recall using that word, but that she only asked if he had been denied access (Tr. at 216, 226).

After he realized that he would not be rehired by Toledo Edison, the complainant called the Region III office of the Nuclear Regulatory Commission (Tr. at 48). That office referred him to Paul Byron, an NRC inspector who worked on site at Davis-Besse. The complainant met with Byron on June 23 and explained his safety complaints, including the incident with AD 1805 Revision 27, but not including the incident on May 5 when he resisted Levering's instruction to fail to maintain the numbering system (C 13 at 29).

On June 24, 1987, the complainant went back to Davis-Besse. He requested to speak to Zunk, the ombudsman. She left a meeting to meet and talk with him (Tr. at 41 1). She stated that at that meeting the complainant brought a private detective with him (Tr. at 412). On that day, the complainant told Zunk about all of his concerns at the plant. Zunk documented them and sent a report of the concerns to Shefers, whom she thought was responsible for addressing the concerns (Tr. at 417, 419; T 17). On July 10, 1987, Zunk

received Shefers' response to the concerns. It appears that not Shefers but Sid Goldstein, the complainant's second level supervisor, wrote out the responses (T 18; C 13 at 44-45; Tr. at 444-45). Zunk took a copy of the response to the complainant's home that day, but did not meet with him (Tr. at 419-20).

The complainant found the answers unsatisfactory and, in fact, laughable (Tr. at 6-4). He called several people at Davis-Besse in an attempt to clarify the explanations they had given, and he stated that when he spoke to them he was angry (Tr. at 64). After that, he picketed outside the plant, but there is no indication that anyone at Davis-Besse knew about the picketing (Tr. at 485-86, 504). The complainant apparently had more contact with the NRC after that, receiving a letter from the Region III office outlining his concerns and sending a reply letter to that correspondence stating that they had inaccurately recounted his concerns. He also called the FBI and asked whether it would investigate the NRC (C 20). He received a letter from Byron on July 20, 1987.

On August 3, 1987, the complainant again returned to Davis-Besse. This time he demanded to meet with Mr. Amerine, Assistant Vice-President of Nuclear (Tr. at 422, 478- 79). He met with Amerine and Zunk, and he again began discussing the problems he had identified at Davis-Besse and that had previously been the subject of the ombudsman's report (Tr. at 423, 479). Both Zunk and Amerine

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stated that although the complainant was lucid and rational when he began the discussion, he became irrational after Amerine indicated that he thought that the complainant's concerns had been addressed (Tr. at 423, 480). Amerine testified that based on the complainant's irrational behavior at the meeting and what Amerine knew about the complainant's history at Davis-Besse, he had the complainant escorted off site on that day (Tr. at 482).

Amerine further testified that he did not recall whether he ordered the complainant's name put on the DAL after the incident, but that the complainant's history would have warranted it (Tr. at 490). Specifically, Amerine was referring to the complainant's coming into work against his supervisor's order (Tr. at 490).

On August 5, 1987, Byron sent a letter to the Allegation Review Board of the NRC regarding the investigation of the complainant's concerns (C 20). In it, he noted that the complainant had threatened to "go to the press" after Byron had indicated that he did not yet have the answers to the complainant's concerns.

On August 7, 1987, Benedict sent a letter informing a badging clerk that the complainant's name was to be put on the DAL (T 19). That letter indicated that the claimant's placement on the list had been ordered by Grimes and that Skeel was the one who told Benedict to put the complainant on the list (T 19). On this document there is no

indication as to who told Grimes to put the complainant on the list, and no indication of the reason for the action. On August 11, 1987, the complainant's name was on the list.

The complainant has been on this list since then. The complainant was not notified by the employer that he was on the DAL. He found out, he stated at the hearing, when he returned to Davis-Besse supposedly to have the Davis- Besse parking sticker removed from his car (Tr. at 70). He asked the entry guard, who had been a member of the same boy scout troop as the complainant, to remove his sticker and then inquired whether he was on the DAL (Tr. at 70). The guard checked and told the complainant that he was on the list. In February of 1988, the complainant states that he inquired whether he was on the list and was told that he was, although there has been no credible evidence of who the complainant talked to or asked about this matter (Tr. at 72). In August 1989, he tried to appeal his status, but was informed by letter from Gary Grimes that his status could not be reviewed until five years from the date he was first put on the list (C 11; Tr. at 73-74).

In the fall of 1987, the complainant went to Toledo Edison's executive offices in Toledo and insisted on speaking with Mr. Don Schultz, Director of Govemment Affairs (Tr. at 501). Schultz became concerned with the complainant's insistence, which frightened the secretaries in the office (Tr. at 502-03).

Schultz called security (Tr. at 503). After the incident, Schultz informed security personnel that the complainant was not to be allowed on site without an appointment (Tr. at 502). Dawn Spain of Industrial Security for Toledo Edison issued a company memorandum to "all property protection officers and Plaza security officers" stating that per Donald Schultz, the complainant was to be denied access to all company sites (T 25).

On November 10, 1987, the complainant met with representatives of the NRC. In this meeting, the complainant fully documented all of his safety concerns regarding Davis-Besse, and he also informed them of his belief that he had been blacklisted (C 13).

The complainant testified that statements made by former co-workers led him to believe that his termination was the result of his resistance to processing AD 1805 Revision 27 and that he was placed on the DAL because he went to the NRC after he was terminated (C 16, T 65 at 116-17).

Beginning after his placement on the DAL and continuing through 1991, the complainant engaged in repeated activities that the complainant calls "protest activity" and the employer calls "harassment." In the autumn of 1987, the complainant appeared at Toledo Edison's executive offices and insisted on seeing Donald Schultz, a member of Toledo Edison's government affairs group. Mr. Schultz became concerned with this insistence, the secretaries were frightened by the complainant, and security was called. Mr. Schultz ordered that the complainant be denied access to all Toledo Edison sites, and a memorandum to that effect was distributed on November 10, 1987 (Tr. at 501-03).

On three or four occasions in the fall of 1988, the complainant picketed the Davis-Besse plant, carrying a sign that said "AD-1805 Revision 27," and "Quality Assurance vs. Plant Manager" (Tr. at 65-67, 184, 188, 504-05). On or about November 8, 1988, the complainant painted the words "NRC, Lou Lied" on the public access road to Davis-Besse and on a road near Lou Storz's house (Tr. at 84-85, 506-09; T 18; T 30).

Even though he had never met Storz, in 1988 (or 1989) the complainant sent him a Christmas card with a cryptic poem (C 16) and a book entitled Fighting with Gandhi with the inscription "Learning through strife. Fr. K.G. to L.S." (C 17). The complainant stated that he sent these things out of "mutual respect" for Storz (T 65 at 155-60).

In June 1989, the complainant posted a sign near Storz's house stating "No more NRC violations" and "Davis-Besse + Violations (NRC) + Human Error = Murder" (T 61). The record is replete with instances in which the complainant

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telephoned various Davis-Besse employees and made obscure statements, sometimes blaming the incident with AD 1805 Revision 27 for his marital problems (Tr. at 174-78, 267-68, 420, 424, 426).

2. Protected Activity. To establish his prima facie case, the complainant must first establish that he engaged in protected activity. The complainant has alleged, through his evidence and testimony, that the following conduct constitutes protected activity: his refusal to fail to maintain the computer software system for the numbering of procedures at the plant, his refusal to process AD 1805 Revision 27 without Levering's written permission, and his meetings with NRC representatives. It is not clear whether the complainant is alleging that his meeting with Zunk on June 24 and his meeting with Zunk and Amerine on August 3 are also protected, but those meetings will also be addressed.

It has been established that under the Act, a good faith refusal to work that is based on an employee's reasonable belief that conditions are unsafe constitutes protected activity. *See Pensyl v. Catalytic, Inc*., 83-ERA-2 (1/13/84); *Tritt v. Fluor Constructors, Inc*., 88-ERA-29 (1-12-89). Here, the complaint's refusal to fail deliberately to maintain the numbering system based on his belief, which I find reasonable, that such failure could jeopardize the safety of a nuclear power plant whose day-to-day operations and safety were guided by these written procedures.

The complainant's resistance to processing AD 1805 Revision 27 was based on his belief that the QAD's signature was required before Revision 27 could be properly processed. The evidence and testimony establish that the complainant's belief was reasonable. For example, several other employees at the plant told him that he was correct in believing that the signature was required before Revision 27 could be properly processed. As stated before, the Davis-Besse plant's operation was defined in large part by written procedure; it was reasonable for the complainant to resist completion of a task that he believed

violated an established procedure. The findings by the NRC and the response to those findings by the employer are further evidence that the complainant's concern was reasonable.

While the complainant would have been protected in refusing to process Revision 27, he did not refuse to process it; he merely insisted that Levering give him written permission to do so. Thus, his conduct cannot be a "refusal to work" and does not invoke the protection set forth in *Pensyl, supra*. However, the testimony shows that the complainant brought the lack of a signature to the attention of several supervisory employees in different

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departments, including his own supervisor. Bringing this potential problem to his supervisor's attention can be regarded as an "internal complaint."

The Secretary of Labor (Secretary) has consistently held that internal complainants constitute protected activity under the Act. *See Mackowiak v. University Nuclear Systems, Inc.,* 82-ERA-8 (4/29/83), *aff'd in part & remanded on other grounds* 735 F.2d 1159 (9th Cir. 1984); *Wells v. Kansas Gas & Electric Co*., 82-ERA-12 (6/14/84); *Francis v. Bogan, Inc*, 86-ERA-8 (1/1/88) and cases cited therein, slip op. at 1. The complainant need not file a written complaint to be protected; he may, e.g., voice his concerns to his union (see *Phillips v. Department of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. Cir. 1974), cited in *Mackowiak, supra*, slip op. at 8-9) or his superiors (*see Poulos v. Ambassadors Fuel Oil Co., Inc*., 86-CAA-1 (A 27, 1987)). In *Mackowiak, supra*, slip op. at 9-10, the Secretary indicated that such protection flows from the overall remedial purpose of the Act, and that employees are often in the best position to observe safety problems.

Protecting internal complaints, even when the employee has no intention of contacting an outside agency, encourages problem-solving at the company level and promotes the reporting of safety violations, the ultimate goal of the Act. *Id.*

Thus, the complainant's conduct in this case of bringing the lack of a signature, which the employee reasonably believed was a violation of plant procedure, to his supervisor's attention constitutes protected activity under the Act. There is no dispute that the complainant's contact with the NRC inspector, Paul Byron, on June 23 and his later meeting with Charles Weil on November 10, 1987, constitutes protected activity. *See* § 5851.

More difficult is whether the complainant's meetings with Zunk on June 24 and with Amerine on August 3 constitute protected activity. The evidence as set forth above shows that when the complainant met with Zunk on June 24, he informed her of the various safety-related complaints that he had a day earlier made to Byron of the NRC. When he returned to see Amerine on August 3, he repeated the same concerns that he had given

Zunk in June. The question is whether these particular safety-related complaints are protected.

First, the Act does not expressly protect such activity. *See* § 5851. As stated above, the Secretary has interpreted the provisions of the Act to protect employees who make internal safety complaints, without defining the limits of what an "internal complaint" may be. Next, I note that if the complainant had still been employed as of the time he engaged in these activities, his conduct would have been protected under the internal complaint

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rule of *Mackowiak* and similar cases.

Moreover, the mere fact that the complainant was a former employee does not automatically preclude all protection of whistleblowing activities. It is clear that a former employee who reports a violation to the appropriate agency is protected from adverse action (such as blacklisting) by his former employer. *See Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1166 (10th Cir. 1977) (protection under Civil Rights Act); *Bailey v. USX Com*., 850 F.2d 1506, 1509-10 (11th Cir. 1988) and cases cited therein (protection under Age Discrimination in Employment Act and Fair Labor Standards Act); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088-89 (5th Cir. 1987) (protection under Age Discrimination in Employment Act). The issue here is whether a former employee who raises safety issues with his former employer, not an independent agency, months after his discharge is protected under the Act.

In *Mackowiak*, the court stated that the Act's broad remedial purpose was to protect "workers from retaliation based on their concerns for safety and quality." 735 F.2d 1159, 1163 (9th Cir. 1984). In *Eigenreider v.Metropolitan Edison Co*., 85-ERA-23 (1987), a blacklisting case, the Secretary further said that "employees must feel secure that *any action* they may take that furthers . . . Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize, either current employment or further employment opportunities." (Emphasis added.) In *Poulos, supra*, the Secretary interpreted a similar provision of the Clean Air Act and emphasized that "Congress intended . . . to protect not just certain activities that would further the Act's policies, but also preliminary steps to those activities. Viewed from an employer's perspective, the statute appears to be aimed at prohibiting discriminatory responses when an employer believes that an employee's activities could result in exposure of employer wrongdoing" (slip op. at 6). As stated above, the Secretary and some courts have implicitly found that internal whistleblowing furthers Congressional policy and purpose.

The evidence in this case shows that the employer routinely required employees who were discharged to undergo an "exit interview" with the company ombudsman. At that interview, the ombudsman asked the former employee to sign a document and indicate whether the employee knew of any safety concerns and whether the employee wanted to

express those concerns to the ombudsman. Further, the ombudsman was available not just to terminated employees but to current employees who had any safety or personnel concerns. Thus, the employer had a practice of encouraging employees to raise safety concerns with the ombudsman while they were employed and even after they had been discharged.

It would further the purpose and policy of the Act and encourage the disclosure of safety related concerns to protect former employees who are

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given the opportunity by their employers to express concerns to an "internal" channel of the employer. It seems fundamentally unfair, and contrary to the protective purpose of § 5851, to permit the employer to elicit safety concerns from former employees and then permit the employer to discriminate against them by blacklisting them for raising those concerns.

Thus, I conclude that the protection of the Act extends to an employee who raises safety concerns with an employer-designated ombudsman or similar representative. The employee here, however, did not inform the ombudsman of his concerns when he had first been terminated; instead, he returned on site a month later and requested to speak to the ombudsman.[3] I do not believe that the intervening month necessarily cuts off the complainant's protection. When he first met with the ombudsman, he was extremely agitated over the circumstances of his rather abrupt (abrupt at least to the complainant) termination the previous Saturday. According to the testimony, he had not been given a definitive reason for his termination at that point. In his agitation, he did not even read the document that the ombudsman presented him regarding whether or not he had any safety concerns.

There is no indication in the record why the complainant returned to Davis- Besse on June 24 to discuss his concerns with Zunk when he had spoken to the NRC the day before. His motivation, however, is irrelevant to the question whether his behavior is protected. *See Sartain v. Bechtel Constructors Corp*., 87-ERA-37 (1/14/88). He returned to the employer's designated recipient of complaints and reported what he considered legitimate safety concerns. This conduct is protected under the Act.

The next question is whether the complainant engaged in protected activity when he returned on site, again unannounced and uninvited, and demanded to speak to the assistant vice-president of nuclear, Mr. Amerine. The considerations that rendered the complainant's meeting with the ombudsman protected do not apply in this instance. The employer had never held out its vice-president or other officers as channels for former or terminated employees' concerns. Such complaints cannot be considered "internal" as that term has been used in other cases; the employee is no longer a part of the organization to which he is presently expressing concern, and as a terminated employee can have no legitimate interest in returning to his former employer's premises for the purpose of

voicing such concerns when he has already exhausted the channels that had been created to handle such complaints. Thus, I conclude that at the time when the complainant spoke to Amerine, his conduct was no longer classified as protected activity under § 5851.

3. Employer's awareness. To establish his prima facie case, the

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complainant must show that his employer was aware of any protected activity in which the complainant engaged. As stated before, the complainant engaged in protected activity when he refused to neglect deliberately the procedure numbering system, when he brought the lack of QAD's signature to Levering's attention, when he contacted and spoke with the NRC, and when he spoke to Zunk, the ombudsman, on July 24. The employer, through its supervisors and its ombudsman, was clearly aware of the complainant's conduct with respect to all of these activities except his contact with the NRC.

The complainant has submitted a letter dated August 5, 1987, from the NRC representative Paul Byron in which Byron refers to a conversation with Zunk, the ombudsman, regarding her July 24 conversation with the complainant, and to Byron's receipt of the response to the ombudsman's report purportedly written by Shefers (C 20). The complainant asserts that Byron's references to Zunk and the response written by Shefers show that Byron discussed his meeting with the complainant with Zunk.

Byron, however, submitting an affidavit in which he stated that he had never discussed with Zunk or any other Davis-Besse employee his conversations with the complainant (T 66). He stated that he received a copy of the ombudsman's report because, as the on-site NRC representative, he routinely received such documentation of safety-related concerns. Zunk testified that she was not contacted by the NRC and did not know that the complainant had contacted it (Tr. at 438).

Based on all of the evidence, the employee has not carried his burden of establishing that the employer was aware of his contact with the NRC before it put him on the DAL, but the complainant has met his burden of establishing that the employer was aware of his other protected activities.

4. Blacklisting. An employer violates the Act if it "intimidates, threatens, restrains, coerces, *blacklists*, discharges, or in any other manner discriminates against" an employee who has engaged in protected activity. 29 C.F.R. § 24.2(b) (emphasis added). As part of the prima facie case, the complainant must show that the employer took adverse action against him. In this case, pursuant to the Secretary's Decision and Order, the complainant's termination is not at issue and only his blacklisting claim may be considered.

The complainant claims that the employer discriminated against him by placing him on a "Denied Access List" (DAL), and that his placement on that list precluded his

employment with his former employer as well as with other employers. The employer does not dispute that the complainant was placed on the DAL.

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There is little case law addressing the activities that fall within the definition of blacklisting. The Secretary stated in the previous Decision and Order in this case that "[w]hile the term 'blacklist' may ordinarily be used to refer to a list of discharged employees which is circulated among multiple employers for the purpose of refusing them employment, see 48 Am. Jur. 2d *Labor & Labor Relations* § 21 (1979), the legal definition is not necessarily so limited" (Secretary's Decision and Order at 9-10) (footnote omitted). The legal definition includes "[a] list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate . . ." (*Black's Law Dictionary* 154 (5th Ed. 1979) (cited in Secretary's Decision and Order at 9-10, n.2).

There is no documentary evidence in the record establishing the employer's policy or rules regarding the DAL as of August 1987 when the complainant was placed on the list. The testimony shows that at that time the DAL served at least two functions: first, it prevented those on the list from gaining physical access to the Davis-Besse facility. Second, it served as an employment screening device. In considering a potential employee, the personnel at Davis-Besse determined whether that person was on the DAL. If he was, it was not supposed to be an automatic bar to re-employment, but that employee's history was reviewed to determine what problems had been encountered in the past that might render the employee undesirable for for re-employment (Tr. at 482-83).

The DAL was supposedly designed only for Davis-Besse's internal use and was not to be circulated to other employers (Tr. at 374-75). While Storz testified that DAL status would not be revealed to employment agencies (C 19 at 12), both Perman, of Benchmark Technologies, and Welter, of Rumpf Corp., testified that they knew when employees had been placed on the list (Tr. at 198-207, 216). Storz also testified that other nuclear facilities had a DAL and that part of the application process at Davis-Besse required answering the question whether the applicant had ever been placed on a DAL at another facility (C 19 at 16). Thus, the complainant's DAL status may have to be revealed to future employers. Subsequent to the complainant's placement on the list, new procedures governing DAL procedure were enacted (Tr. at 361-62). These new rules require a flat five-year waiting period, with certain limited exceptions, before a person's DAL status can be reviewed (T 59 at 23).

This description of the DAL shows that it falls within the definition of blacklisting as set forth in the Secretary's prior Decision and Order. It is clear that those on the list are 11 singled out for special avoidance" by the employer that prepared the list and perhaps other potential employers as well. Thus, the complainant's placement on the DAL

constituted blacklisting and the complainant has shown that he was discriminated against within the meaning of

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the Act.

The evidence is ambiguous as to whether the complainant was placed on the DAL when he was first terminated or whether he was placed on the list only in August 1987. Shefers circulated an internal memorandum on May 26, 1987, indicating that his department had been asked "to review [its] *initial request* to place [the complainant] on the denied access list" (T 15) (emphasis added). The memorandum closed with the sentence, "we agree to remove [the complainant] from the denied access list" (T 15). There is no documentation of Shefers' request that the complainant be placed on the list, and no testimony from Rourke that she had been contacted to place him on the list prior to August 7. Rourke testified that she had spoken with Grimes and that he told her it was o.k. to remove the complainant from the DAL. She put the word "remove" in quotations because to the best of her knowledge, he had never been on the list.

I think that the evidence demonstrates that the complainant was not placed on the DAL when he was first terminated but that Shefers had initially requested that he be placed on the list. When I&C requested reconsideration of Shefers' decision, Shefers agreed to "remove" the complainant from the DAL without knowing whether he had already been placed on the list.

5. Causation. Finally, the employee must show that the employer discriminated against him because of his protected activity. To establish the prima facie case, the employee must merely show that his protected activity was likely the reason for the adverse action. If the complainant meets this burden, the burden of production shifts to the employer to show a legitimate, non-discriminatory justification for placing the complainant on the list. *See Dartey, supra.*

Circumstantial evidence may be used to show retaliatory motive where no direct evidence exists. *See Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. den*. 450 U.S. 1040 (1981). The complainant claims that the circumstances surrounding his termination show retaliatory motive (*see Complainant's Proposed Findings of Fact and Conclusions of Law* at 16-17). He asserts that the timing and abruptness of his discharge, the expressions of satisfaction with his work both before and after his termination, and the inconsistent reasons given for his termination show retaliatory motive. [4]

The evidence shows that Levering and Goldstein had agreed on Tuesday, May 12, that Goldstein would discharge the complainant on Monday, May 18. The reason given for their decision that day was not poor work quality but the

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complainant's inability to work well with the others in the section, in particular his apparent inability to get along with Levering or follow her orders. He was terminated on Saturday, May 16, because he had gone to work when Levering had told him not to do so.[5] Thus, the *timing* of the complainant's termination on Saturday was due to his failure to follow Levering's order not to report to work on that day.

The complainant was not given a reason for his termination that Saturday although he repeatedly asked for an explanation. Linda Perman of Benchmark Technologies was told that the complainant was terminated because he had gone in to work against orders (Tr. at 202-03), but her letter to the complainant indicated only that he had been terminated due to a reduction in force. In the employer's response to the complainant's interrogatories, the employer indicated that the complainant had been discharged for poor job performance (C 15). Levering, in her testimony, stated that she and Goldstein had agreed to terminate the complainant on Monday, May 18, "because of all the problems with personnel and the tension that he was causing . . ." (Tr. at 239), and she also stated that his work contained an unacceptable number of errors (Tr. at 232).

The complainant was never told, however, that he caused problems with the other employees or that his work was unacceptable. In fact, after his termination, Goldstein told him that there was no reason he could not be rehired by Davis-Besse, and he was considered for employment by the I&C department of Davis-Besse. He was not hired, but no explanation was ever given as to why he was not.

The circumstances surrounding the complainant's placement on the DAL are as ambiguous as the reasons for his termination. The employer has alleged that Amerine made the decision to place the complainant on the DAL, but Amerine has no memory of whether he did or not (Tr. at 484). The only reason listed for his placement on the list was a code-- "#10" (T 19). This code, Rourke testified, means "pending investigation" (Tr. at 466). There, is no documentation or other evidence of whether that investigation ever concluded or what those conclusions were. Schumaker testified that the reason given for the complainant's placement on the list was "Other" (Tr. at 383). The complainant himself was never notified that he was placed on the list, and when he requested to know the reasons for his placement on it, the employer merely responded that appeals of denied access status would not be considered until five years after the initial placement.

From the complainant's first day of work in April to his placement on the DAL four months later, he engaged in three acts of protected conduct of which the

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employer was aware.[6] These acts, combined with the ambiguous circumstances surrounding the complainant's termination and his placement on the DAL, satisfy the

complainant's burden to show that his protected activity was the likely cause in his employer's decision to blacklist him. Because the complainant has made out a prima facie case of discrimination, the burden shifts to the employer to rebut the inference of retaliation by producing some evidence of a legitimate, non-discriminatory reason for placing the complainant on the DAL. *See Dartey, supra; Emory, supra*. Although "the evidence must be sufficient to raise an issue of fact as to whether the employer discriminated against the employee," *see Ertel v. Giroux Bros. Transportation*, 88-STA-24 (Feb. 16, 1989), the ultimate burden of proving unlawful discrimination remains with the employee. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1991); *Dartey, supra*.

C. Rebuttal. The employer claims that the complainant's unexpected, uninvited return to Davis-Besse on August 3 when he demanded to speak to Amerine was the "last straw" (Brief of the employer at 13). The employer argues that this meeting, in which the complainant supposedly became "irrational" and made several accusations, when combined with the complainant's prior erratic behavior, including coming to work when he wasn't authorized, was enough to warrant placing the complainant on the DAL.

The evidence substantiates the employer's perception of the complainant's behavior as erratic. The complainant admitted that he had, on occasion, raised his voice in confrontation with his supervisors. He had disobeyed his supervisor's order not to go to work on Saturday, May 16. While being escorted off site that day, he shouted at Levering that her lies had better be good to hold up the following Monday and that he walked with God but she did not. He made repeated telephone calls to Davis-Besse employees after his termination and after receiving the responses to the ombudsman's report He returned on site almost three months after his termination and demanded to speak with the assistance vice-president of nuclear, and at that meeting became irrational and made accusations.

Despite Levering's written documentation of her problems with the complainant, the problems that the employer had experienced with the complainant prior to his termination were apparently not considered serious enough in May to prevent the complainant from being considered for employment by another division of Davis-Besse (I&C). Although Shefers had initially requested that the complainant be placed on the list, he was willing, with some reservation, to keep the complainant off the list and allow I&C to hire, the complainant Even Levering believed just after his discharge that he could work in the

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plant's "protected area," which requires a security clearance. Therefore, I infer that the primary motivating factor in the complainant's placement on the list occurred sometime between the time he was "removed" from the list and August 11, when his name was put back on.

In that time frame, the complainant contacted and spoke with the NRC (protected activity), returned on site to talk to the ombudsman (protected activity), and met with Amerine (not protected). The employer was not aware of the complainant's contact with the NRC. The complainant was not placed on the list after he visited the ombudsman and made his complaints known, nor was he placed on after he received copies of the employer's responses and began telephoning various employees at Davis-Besse. He was placed on the list almost immediately after he returned on site, three months after his termination, without warning, and demanded to speak to Amerine. This chronology tends to support the employer's argument that it was not motivated by the complainant's protected activity but by the complainant's unexpected meeting with Amerine, where the complainant made accusations and behaved irrationally.

The employer has met its burden of establishing a legitimate, non-discriminatory reason for its actions. Amerine's testimony that the complainant's conduct in coming to work against orders and unexpectedly returning on site months after his termination, coupled with his inappropriate behavior at their meeting, as well as the timing of the complainant's placement on the list satisfies the employer's burden of producing some evidence to show a legitimate justification for the complainant's placement on the list. The burden now shifts to the complainant to show that the employer's proffered justification is mere pretext.

D. Pretext. There is no dispute that the complainant engaged in the conduct upon which the employer relies for its justification. It is the complainant's burden, therefore, to establish that the employer was not in fact motivated by his conduct but by his protected activities, at least in part, in the action it took against him.

Without direct evidence of discrimination, the complainant must rely on circumstantial evidence to meet his burden. The following circumstantial evidence has been presented to establish that the employer's proffered justification is mere pretext: 1) the complainant's conduct before he was terminated (including the behavior that caused his termination) was not considered egregious enough to place and keep him on the DAL after his discharge, and in fact the complainant was told by various Davis-Besse personnel (Dillich and Goldstein) that he could be rehired; 2) the employer provided inadequate answers to the complainant's concern regarding AD 1805 Revision 27 on the Response to the Ombudsman's Report; 3) no definitive mason

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was ever documented for the complainant's placement on the DAL; 4) the complainant was never informed that he was on the DAL.

The employer's treatment of the complainant's Revision 27 concern substantiates the I complainant's belief that the procedure should not have been processed without the QAD's signature. However, the issue in this claim is not whether the complainant was correct in his assertion that the employer violated its own internal rules, but whether the

employer discriminated against the complainant because the complainant blew the whistle on that violation. This the complainant has failed to do.

The testimony shows that at the time of the complainant's placement on the DAL, there was not a formal procedure established governing the process for placing an employee in the list. The formal procedure was not established until after the complainant's placement on the list. The circumstances surrounding the complainant's placement on the list reflect this procedural void. Without evidence to establish that the employer followed a different procedure for placing the complainant on the list than it followed for other employees, these circumstances alone do not show that the employer was motivated by retaliation.

Based on all of the evidence, I find that the complainant has not proven that the employer was motivated, in whole or in part, by the complainant's protected conduct when it placed him on the DAL in August 1987. I find that Amerine ordered the complainant placed on the list in response primarily to the complainant's return on site in August 1987 and his irrational behavior during their meeting. This conduct when combined with the circumstances surrounding the complainant's termination shows a tendency toward unpredictable, undependable behavior, and justifies a nuclear facility in denying access to its site and preventing re-employment. Under these circumstances, I consider it unlikely that the respondent was motivated, in whole or in part, by the complainant's protected activity.

Further, the evidence establishes that the respondent was justified in maintaining the claimant's name on the DAL after August 1987. As recounted above, the claimant engaged in bizarre behavior that the respondent perceived as harassment: repeated phone calls to various employees of the respondent's and picketing outside the plant; painting messages on the public roadways near Davis-Besse and Storz's home; and sending Storz, whom the complainant had never met, a book and a card with cryptic messages. Thus, the complainant's continuing "denied access" status as well as his initial placement on the DAL were justified by legitimate reasons and not motivated by the complainant's protected conduct.

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E. Conclusion. Based on all of the evidence presented, the complainant has failed to prove that his placement on the DAL was blacklisting prohibited by § 5851 of the Act. Accordingly, it is concluded that the complaint should be dismissed.

RECOMMENDED ORDER

It is hereby recommended that the complaint of Kevin Garn against Toledo Edison Company be denied.

Charles W. Campbell
Administrative Law Judge

[ENDNOTES]

[1] The following abbreviations will be used: C - Complainant's Exhibit; T - Toledo Edison's Exhibit; Tr. - Transcript

[2] AV 115 was subsequently revised, and a new procedure, NG-IM-000115, now covers this situation.

[3] At the hearing, the complainant stated that the ombudsman called him soon after he had spoken to the NRC representative and requested that he come to the plant and recount his concerns. He stated that the request caused him some concern because it came so soon after his meeting with the NRC. However, in his earlier depositions and in the statement he made to the NRC in November of 1989, he did not say that the ombudsman had called him. At the meeting with the NRC representatives, the complainant stated "it was the last week in June when I let her know--I had a second meeting with her in which I described all the incidents that took place" (C 13 at 43-44). Zunk denies that she called him or made an appointment to speak with him about his concerns (Tr. at 408). Her calendar showed that she had a meeting scheduled for that day, and that she left the meeting early to meet with the complainant (T 63 at 2). I do not credit the complainant's testimony that Zunk called him and arranged the meeting.

[4] It is not the complainant's termination but his placement on the DAL that is at issue in this case; however, the circumstances surrounding his termination may be relevant to the determination of the employer's later motive

[5] While Levering's statement, "please don't," spoken in the context of the conversation could have been interpreted as something less than a direct, unequivocal order not to go into work for overtime on Saturday, the complainant has admitted that he knew he should not have gone into work that day over Levering's less than strenuous objection and without authorization of his overtime (T 64 at 51).

[6] The complainant also contacted the NRC, which is protected activity, but as stated earlier, the evidence shows that the employer was not aware of this conduct